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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE NATIONAL FEDERATION OF THE BLIND and DONALD J. MORRIS,

Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; JESSE BROWN, Secretary, Department of Veterans Affairs; JOHN T. FARRAR, Under Secretary for Health, Department of Veterans Affairs; MICHAEL B. PHAUP, Director, Veterans Affairs Medical Center; and MARYLAND DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Randolph-Sheppard arbitration panel convened under 20 U.S.C. § 107d-1 and proceeding pursuant to 20 U.S.C. § 107d-2 has the power to render an award remedying violations of the Randolph-Sheppard Act, 20 U.S.C. § 107, *et seq.*, such that a Federal Court can and should enforce that award?

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PETITION FOR A WRIT OF CERTIORARI

The National Federation of the Blind and Donald J. Morris (collectively, the "NFB") respectfully petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals below (Maryland App., pp. 1a-14a)* is reported at 98 F.3d 165. The opin-

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* The NFB understands that the State of Maryland will also petition this Court for a Writ of Certiorari in the case at bar. The reference to the "Maryland App." is to the Appendix which the NFB expects the State of Maryland to file in connection with its Petition.

ion of the District Court below (Maryland App., pp. 17a-31a) is reported at 896 F. Supp. 513.

JURISDICTION

The Court of Appeals below entered its judgment on October 22, 1996 (Maryland App., p. 14a). Timely Motions for Rehearing pursuant to Fed. R. App. P. 40 were filed on November 4, 1996. Those Motions were denied by the Court of Appeals below on December 31, 1996 (Maryland App., pp. 15a-16a). While the NFB appeared as an *Amicus Curiae* prior to October 22, 1996, pursuant to 28 U.S.C. § 1651 it filed a Motion to Intervene in this case on its own behalf and on behalf of a blind vendor in the State of Maryland, Donald J. Morris, on November 4, 1996. That Motion was granted by the Court of Appeals below on December 31, 1996 (Maryland App., pp. 15a-16a). The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional Provisions which relate to this case, directly or indirectly, are the Fifth, Eleventh, and Fourteenth Amendments to the United States Constitution. The Statutes at issue in this case are 20 U.S.C. § 107d-1 and § 107d-2, which provide the exclusive remedy for violations of the Randolph-Sheppard Act, 20 U.S.C. § 107, *et. seq.*

SUMMARY OF THE NFB'S PETITION

In this case, the Courts below have determined that arbitration panels convened under 20 U.S.C. § 107d-1(b) to resolve disputes between state agencies, charged with protecting the rights of the blind under the Randolph-Sheppard Act, and federal property managers, are without power to make an award specifying and providing a judicially enforceable remedy for violations of the Act. The Court of Appeals below affirmed the District Court which held that such a panel "has no remedial powers whatsoever."[1] In so holding, the decision of the Court below

[1] 896 F. Supp. at 517; 98 F.3d at 168.

is in conflict with many other Federal Circuits and is in conflict with a number of precedents of this Court, including this Court's recent reiteration in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) of the ancient principle that " 'where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.' " *Id.* at 66. As a further result of the decision of the Court below, the Constitutional Law and Federal Law rights of the blind citizens of this Country have been gravely imperiled.

STATEMENT

A. The National Federation of the Blind and Its Charter

The goal of the NFB is to promote the general welfare of the blind, to assist the blind in their efforts to integrate themselves into society through training programs, and to change the social attitudes which tend to deny opportunity based on limited notions of what people who are blind can do.

The Constitution of the NFB provides, *inter alia,* that the purpose of the NFB is to move the blind from second class citizenship to first class citizenship. The NFB also seeks to insure that the blind learn self-sufficiency, and that they learn to treat blindness as a nuisance rather than as a life altering disability. The purpose of the NFB is to serve the interests of all the blind citizens in this Nation by eliminating barriers to equal employment and equal treatment through the concerted activity of blind people working on behalf of blind people. The NFB seeks to achieve its goals by means of a combination of education through literature and programs, and advocacy of blind rights whenever and wherever appropriate. The purpose and goals are consistent with the NFB's status as a disability rights advocacy organization under the Randolph-Sheppard Act, 20 U.S.C. § 107, *et seq.,* provisions of which are directly at issue in the case at bar, and closely related laws such as the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701, *et seq.*

B. The Randolph-Sheppard Act

The Randolph-Sheppard Vending Stand Act, 20 U.S.C. §§ 107-107f ("the Act") was first enacted in 1936. Ch. 638, 49 Stat. 1559 (1936). Its purpose was to provide employment opportunities on federal property to blind vendors, to afford them self-sufficiency, and to further federal rehabilitative efforts on their behalf. 20 U.S.C. § 107(a); H.R. Rep. No. 1094, 74th Cong., 1st Sess. 2 (1936); S. Rep. No. 93-937, 93rd Cong., 2nd Sess. 5 (1974).

The original Act was only moderately successful. Part of the problem was general apathy to the Act among the federal agencies. *Texas State Commission for the Blind v. United States*, 796 F.2d 400, 402 (Fed. Cir. 1986). In addition, civilian employee welfare and recreation groups of certain federal agencies were being permitted by federal agencies to place vending machines in federal buildings to finance the activities of such groups. *Id.* The competition from these machines diverted income from blind vendors and made the establishment of new blind vending stands economically unattractive. *Id.*

In 1954, Congress amended the Act to make it more effective by mandating that blind vendors be given a "preference," so far as feasible, in establishing new blind vending stands on federal property and by authorizing the heads of federal agencies to assign vending machine income to blind vendors with whom non-blind vending machines directly competed in order to assure such a preference. Pub. L. No. 83-565, Sec. 4, 68 Stat. 663 (1954).

Largely because of what the Comptroller General of the United States identified in 1973 as widespread abuses of the blind vendor program by a number of federal agencies, the Act was further amended in 1974. *Report to the SubCommittee on the Handicapped of the Committee on Labor and Public Welfare by the Comptroller General of the United States*, pp. 25 to 50, included in the Transcript of the *1973 Hearings before the SubCommittee on the Handicapped on Labor and Public Welfare on S. 2581*,

93rd Cong., 1st Sess. (1973) [in the record below as an appendix to the Brief *Amicus Curiae* of the NFB, filed with the Court of Appeals below on October 21, 1995]. By a nearly unanimous vote, Congress passed the 1974 Amendments to the Act by a vote of 398 to 7 in the House, and by a vote of 90 to 1 in the Senate. 120 Cong. Rec. 36,853 (1974); *Senate Report No. 93-1297*, 1974 U.S.C.C.A.N. 6373.

The 1974 Amendments to the Act authorize blind persons to operate vending facilities on federal property, and require that blind vendors licensed under the Act are to be given *priority* to operate such facilities. 20 U.S.C. § 107(b). Once a blind vendor becomes licensed to operate a facility, the vendor is assigned a vending stand to operate as a sole proprietor, and the vendor is given an initial stock of inventory and a petty cash fund. 20 U.S.C. § 107b(2). Thereafter, the vendor is entitled to profits and is responsible for losses and operating expenses, including the replacement of inventory and the payment of sales tax. *Committee of Blind Vendors of the District of Columbia v. District of Columbia*, 736 F.Supp. 292, 297 (D. D.C. 1990), *rev'd on other grounds*, 28 F.3d 130 (D.C. Cir. 1994).

The states, through their rehabilitation agencies established pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, are responsible for the training (20 U.S.C. § 107d-4), licensing and placing of blind vendors on federal property (20 U.S.C. § 107a), and thereafter for securing the work environment of blind vendors while working on federal property. 20 U.S.C. § 107d-3. For the purposes of the Randolph-Sheppard Act, those state rehabilitation agencies are known as "state licensing agencies," or "SLAs." *Committee of Blind Vendors*, 736 F.Supp. at 296.

Any limitation on the placement or operation of a vending facility on federal property based on a finding by a federal property manager that such placement or operation would adversely affect the interests of the United States

"shall be fully justified in writing to the Secretary [of Education], who shall determine whether such limitation is justified." 20 U.S.C. § 107(b).

Each SLA is required "to provide to any blind licensee dissatisfied with *any action arising from the operation or administration of the vending facility program* an opportunity for a *fair hearing*, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title [Emphasis supplied]." 20 U.S.C. § 107b(6).

20 U.S.C. § 107d-1 and § 107d-2, which control arbitrations under the Act, are the statutes at issue in the case at bar. Section 107d-1(a) provides in pertinent part that "any blind licensee dissatisfied with *any action arising from the operation or administration of the vending facility program* . . . [Emphasis supplied]" has the right to have his grievance submitted to final and binding arbitration, but the blind licensee is only permitted to directly arbitrate his grievances with the relevant SLA. *Id.* Section 107d-1(b) provides in pertinent part that "whenever any [SLA] determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the Act . . .," then in that event the SLA may seek to have the action of the federal property manager corrected by means of final and binding arbitration. *Id.* Section 107d-2 details the procedures which are to be employed in convening and conducting the arbitrations called for under § 107d-1. By their terms, the provisions of 20 U.S.C. § 107d-1 and § 107d-2 provide the exclusive method of resolving any dispute arising under the Act.[2]

While blind vendors are not named as a party-plaintiff in any arbitration between an SLA and a federal property manager, courts have held that blind vendors, such as

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[2] The Court of Appeals for the District of Columbia also concluded that those provisions were the exclusive method of resolving disputes under the Act. *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 102-103 (D.C. Cir. 1986).

Petitioner Morris herein,[8] are nonetheless third-party beneficiaries of the licensing agreements between the participating states under the Act and the federal government. *Delaware Department of Health and Social Services v. United States Department of Education*, 772 F.2d 1123, 1127 (3rd Cir. 1985).

C. The Proceedings Below

The NFB adopts the statement contained in the State of Maryland's Petition for a Writ of Certiorari in the case at bar, and incorporates same in this Petition as though set forth in full. The NFB wishes, however, to supplement Maryland's Statement with the following from the Record below.

The allocation of even 250 square feet of space for a blind vending facility at the VAMC was unacceptable to the Department of Veterans Affairs ("DVA") and the Veterans Canteen Service ("VCS"), a part of the DVA (J.A. 59-71), at the time of the evidentiary hearing before the § 107d-1(b) arbitration panel below. The acting chief of staff of the VAMC testified that "it would be over my dead body [that] they expanded" space for the canteen at the VAMC in order to accommodate a blind vending stand (J.A. 64-65). Because the DVA and the VCS had argued that there was no space available at the VAMC for a blind vendor facility, the arbitration panel ordered the DVA to turn over operation of the retail store operated by the VCS (J.A. 29), which retail store occupies less than 1,000 square feet (J.A. 61-62).

After the MSDE sought enforcement of the arbitration award before the District Court below, and almost one year after the date the arbitration panel had set as a deadline for the submission of a proposed permit to the panel designating space for a blind vendor stand, the DVA filed with the District Court, on June 1, 1995, the Secretary of Veterans Affairs' acknowledgment that there

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[8] Petitioner Morris was the blind vendor who would have applied for a permit to operate a vending stand at the VAMC in this case.

were at least three spaces available for a blind vending facility at the VAMC (J.A. 205).

While the VCS concession facilities occupy about 20,000 square feet at the VAMC, the DVA on June 1, 1995, offered the MSDE between 277 and 570 square feet of space currently being utilized as storage closets, an offer which the MSDE declined on the grounds that the proposed sites could not provide a self-supporting income to a licensed blind vendor (J.A. 186-189).

The DVA never requested a determination from the Secretary of Education pursuant to 20 U.S.C. § 107(b) approving the DVA's attempted limitation on the placement and operation of a blind vending facility at the VAMC (J.A. 23; 53; 221, ¶ 14).

In response to the MSDE's argument that under the interpretation thus adopted by the Court of Appeals "a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel," the Court of Appeals below acknowledged that such a result might occur but within the meaning of and in reliance on *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930), it would not be a result which is " 'so gross as to shock the general moral or common sense.' " *Maryland State Department of Education v. United States Department of Veterans Affairs*, 98 F.3d 165, 170 (4th Cir. 1996).

The Court of Appeals below acknowledges that its decision is in direct conflict with the decision of the Court of Appeals for the District of Columbia in *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986). *Id.* at 170. After questioning the analysis and reasoning of the *Weinberger* Court, the Court of Appeals below specifically and squarely refused to follow the decision in *Weinberger* in the following terms: "We believe that our interpretation of § 107d-2(b)(2) gives effect to all of the language of the provision and, therefore, decline to follow the District of Columbia Circuit's interpretation of § 107d-2(b)(2)." *Id.*

THE IMPORTANCE OF THE QUESTION

Because, as will be demonstrated *infra,* the Constitutional and other Federal rights of the blind citizens of this Nation are gravely imperiled by the decision of the Court of Appeals below under the only Act of Congress solely designated to protect those rights, an Act which has never been before this Court in its sixty-one year history,[4] the NFB respectfully but strenuously urges this Court to exercise its Certiorari Jurisdiction to resolve what has now become a sharp split among the Circuits concerning the meaning of 20 U.S.C. § 107d-1 and § 107d-2. A close study of the decisions of a number of Courts, including now the Court of Appeals below, further reveals that there is a great deal of confusion among the lower Federal Courts in this Nation in general concerning the proper application of 20 U.S.C. § 107d-1 and § 107d-2. The split among the Circuits in this Nation has percolated and the confusion concerning those provisions has persisted for a very considerable period of time, especially in view of the fact that the confusion and the split involve important questions of Constitutional Law and Federal Law critical to the rights of the blind of this Nation.

REASONS FOR GRANTING THE PETITION

The NFB recognizes that the United States Supreme Court is not primarily an error correcting Court. Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* 162-164 (BNA 7th Ed. 1993). However, the Supreme Court often will grant Certiorari where the decisions of two or more Federal Courts of Appeals are in conflict and the conflict has percolated for a considerable period of time, therefore resulting in confusion among the lower courts concerning important issues of Constitutional Law or Federal Law. *Id.* at 168-193.

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[4] As this Court has said, where there is a question of importance not heretofore considered by this Court, and one over which the Circuits are divided, Certiorari may lie. *Lehman v. Lycoming County,* 458 U.S. 502, 507 (1982).

The existence of the clear split among the Circuits regarding the issue herein warrants the invocation of this Court's Certiorari Jurisdiction. The split has percolated in the courts below for a considerable period of time, and has fully and clearly illuminated the issue which is in vital need of resolution. Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982). Moreover, the issue at stake herein involves vital questions of Constitutional Law and Federal Law, as to which there have been confusing and differing judicial responses in no fewer than eight Federal Circuits.

I. THE COURT OF APPEALS' INTERPRETATION OF 20 U.S.C. § 107d-1 CONFLICTS WITH DECISIONS FROM A NUMBER OF OTHER CIRCUIT COURTS OF APPEALS

Courts of Appeals in eight Circuits, and District Courts sitting in two other Circuits, have undertaken efforts to interpret the powers of an arbitration panel convened pursuant to 20 U.S.C. § 107d-1 and reached different conclusions. The Court of Appeals below (the Fourth Circuit) and the Eleventh Circuit have held that an arbitration panel convened pursuant to § 107d-1 has no remedial powers whatsoever. *Maryland State Department of Education v. United States Department of Veterans Affairs*, 98 F.3d 165, 168 (4th Cir. 1996) (the Court below); and *Georgia Department of Health and Social Services v. Nash*, 915 F.2d 1482, 1492 (11th Cir. 1990).[5]

On the other hand, the D.C. Circuit, Third Circuit, Sixth Circuit, and the Eighth Circuit have held that such a panel has remedial powers which are enforceable in Federal Court. *Randolph-Sheppard Vendors of America*

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[5] *See also, Maryland State Department of Education v. United States Department of Veterans Affairs*, 896 F. Supp. 513, 517 (D. Md. 1995) (District Court below); *United States v. Mississippi Vocational Rehabilitation for the Blind*, 794 F. Supp. 1344 (S.D. Miss. 1992); *United States v. Mississippi Vocational Rehabilitation for the Blind*, 812 F. Supp. 85 (S.D. Miss. 1992).

v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986);[6] *Delaware Department of Health and Social Services*, 772 F.2d 1123 (3rd Cir. 1985); *Tennessee Department of Human Services v. United States Department of Education*, 979 F.2d 1162 (6th Cir. 1992); *cf. Fillinger v. Cleveland Society for the Blind*, 587 F.2d 336 (6th Cir. 1978); *McNabb v. United States Department of Education*, 862 F.2d 681 (8th Cir. 1988); *Minnesota Department of Jobs & Training v. Riley*, 18 F.3d 606 (8th Cir. 1994); and *Minnesota Department of Economic Security v. Riley*, —— F.3d ——, 1997 WL 78402 (8th Cir. Feb. 26, 1997).

Additionally, Courts in the Federal Circuit, Second Circuit, Sixth Circuit, and the Seventh Circuit have implicitly acknowledged the remedial powers of such an arbitration panel. *Texas State Commission for the Blind v. United States*, 796 F.2d 400 (Fed. Cir. 1986);[7] *New York v. United States Postal Service*, 690 F. Supp. 1346 (S.D.N.Y. 1988); *Hinton v. United States Department of Education*, 700 F. Supp. 21 (E.D. Tenn. 1988); and *Howe v. Bolger*, 35 CCH EPD 34,822 (E.D. Wis. 1984).

A. The Court Below Acknowledges That Its Decision Is in Conflict With the *Weinberger* Decision From the District of Columbia

We begin with an analysis of the decision of the Court of Appeals below and the decision of the Court of Appeals for the D.C. Circuit in *Weinberger*. After acknowledging the existence of a difference of interpretation with the *Weinberger* Court, the Court of Appeals below concludes:

> As Maryland notes, the legislative history indicates that Congress enacted the remedial provisions of the Act [20 U.S.C. § 107d-1 and § 107d-2] to 'provide

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[6] *See also, Committee of Blind Vendors v. District of Columbia*, 736 F. Supp. 292 (D. D.C. 1990), *rev'd on other grounds*, 28 F.3d 130 (D.C. Cir. 1994); *Massachusetts Elected Committee of Blind Vendors v. Matava*, 482 F. Supp. 1186 (D.C. Mass. 1980).

[7] *See also, Oklahoma v. Weinberger*, 741 F.2d 290 (10th Cir. 1983).

> the means by which aggrieved vendors and State agencies may obtain a final and satisfactory resolution of disputes . . .'. This legislative history does not, however, cast a shadow on our holding or the Eleventh Circuit's interpretation of § 107d-2(b)(2) in *Nash*. While the Senate Report indicates that Congress intended to provide a final resolution of disputes arising from the administration of the Act, it does not clearly express Congress' intent that the resolution of every facet of these disputes—that is, both the fact of a violation and the appropriate remedy—should lie with the arbitration panel. As indicated above, we read the plain language of the statute to require that the arbitration panel resolve the dispute as to whether the federal entity in question is in violation of the statute, while the responsibility for correcting the violation lies with the federal entity head. Nothing in the legislative history cited by Maryland suggests that this interpretation will produce a result 'demonstrably at odds with the intentions of [the Act's] drafters.'

Maryland, 98 F.3d at 171.

The NFB asks this Court to contrast the foregoing with the clear and forceful interpretation of 20 U.S.C. § 107d-1 and § 107d-2, and the Legislative History underlying those provisions, in the *Weinberger* decision:

> We first examine the scope of the arbitration requirement. In establishing the grievance and arbitration procedure, the Senate Committee reviewing the 1974 amendments to the Act stated that '[i]t is the expectation of the Committee that the arbitration and review procedures adopted . . . will provide the means by which aggrieved vendors and State agencies may obtain final and satisfactory resolution of disputes.' . . . The statutory language regarding state licensing agencies is equally explicit, providing that [*w*]*henever* any State licensing agency determines that any [federal agency] . . . is failing to comply with the provisions of this chapter or any regulations issued thereunder . . . such licensing agency may file a complaint with the Secretary who shall convene a panel to arbi-

> trate the dispute. . . .' For both a blind licensee and a state agency, an arbitration decision is 'final and binding on the parties except as otherwise provided in [the Act].' 20 U.S.C. Secs. 107d-1(a), (b). Finally, the Act provides for judicial review of the arbitration decision after 'final agency action.' 20 U.S.C. Sec. 107d-2(a). . . . Most telling as to Congress' intent, however, is its statement that an arbitration decision 'shall be subject to appeal and review as a final agency action.' 20 U.S.C. Sec. 107d-2(a). In contrast to de novo review, judicial review of final agency action is 'severely circumscribed,' requiring a reviewing court to determine whether a decision is within the ambit of the agency's discretion and supported by the record. . . . *Surely Congress contemplated that disputes betwen state agencies and government agencies could involve contract awards, such as the one at issue here. Congress nevertheless set up an arbitration scheme instead of authorizing direct resort to federal court. As Justice Brandeis stated the 'well settled' rule: 'where a statute creates a right and provides a special remedy, that remedy is exclusive.'* [Emphasis supplied].

Weinberger, 795 F.2d at 101-103.

The difference in the approach to the statutory construction of § 107d-1 and § 107d-2, and the resulting conclusions of the Court of Appeals below and the Court of Appeals for the District of Columbia could not be clearer. As Justice Frankfurter long ago suggested, the exercise of this Court's Certiorari Jurisdiction may be justified where the question at issue involves a matter of statutory construction or application which is of singular significance to the administration of an Act of Congress. *United States v. Ruzicka*, 329 U.S. 287, 288 (1946); *see also, Linkletter v. Walker*, 381 U.S. 618, 620 (1965).

B. The Court of Appeals' Decision Below Conflicts With Decisions of Other Courts of Appeal and District Courts

In *Minnesota Department of Jobs & Training v. Riley ("Riley I")*, 18 F.3d 606 (8th Cir. 1994), a case involving

the same defendant as the Respondent DVA in the case at bar, the VCS similarly refused to issue a permit, for different reasons, to the SLA. The SLA also filed a complaint with the Secretary of Education, and an *ad hoc* arbitration panel was convened. *Id.* at 608. The panel ruled in favor of the SLA, and the SLA then sought to enforce the resulting arbitration award in District Court. Unlike the case at bar, the District Court ordered enforcement through and by means of a summary judgment in favor of the SLA. *Id.* In upholding the District Court, the Court of Appeals in *Riley I* stated that, based on the plain language of the Randolph-Sheppard Act, "[t]he VCS must comply with the regulatory scheme for implementing blind vendor operations on VA property. Neither the Act nor the regulations permit the VCS to pick and choose which of the Act's governing regulations to follow." *Id.* at 609.

The Eighth Circuit Court of Appeals very recently issued yet another decision which, like *Riley I*, stands in direct opposition to the result reached in the Court of Appeals below. In *Minnesota Department of Economic Security v. Riley ("Riley II")*, —— F.3d ——, 1997 WL 78402 (8th Cir. Feb. 26, 1997), the Eighth Circuit was compelled to revisit once again the intransigence of the Respondent DVA. In language which at once demonstrates the split among the Eighth Circuit and the Court of Appeals below and also buttresses the contention that the split in the Circuits has percolated for a considerable period of time, the Eighth Circuit emphatically declared:

> In truth, the [DVA] has done far more than merely limit the blind vendor's operation at the VA Medical Center. Congress assumed federal agencies would respect a blind person's vending enterprise and willingly comply with the Act. . . . Instead, the [Veterans Administration] has tried to drive the blind vendor out of its domain. . . . Nine years later, the [Veterans Administration] is still at it, demanding the right to install machines that would, as the district court found, destroy the blind vendor's

> livelihood. It is time for the [Veterans Administration's] scorched-earth campaign to end.

1997 WL 78402 at *2.

Unlike the Court of Appeals below, the Court of Appeals for the Eighth Circuit in *Riley II* emphatically and unequivocally held: "The VCS is no different from any other steward of federal property. If the VCS wants to impose limitations on a blind vendor's operation, it must get permission from the Secretary of Education." *Id.* at *3.

Another case interpreting and applying 20 U.S.C. §107d-1(b) which implicitly reaches a strikingly different conclusion from that of the Court of Appeals below is *Texas State Commission for the Blind v. United States*, 796 F.2d 400 (Fed. Cir. 1986). The facts and the holding of that case are not on all fours with the case at bar. However, the implicit acknowledgement by the *Texas* Court of the remedial powers of an arbitration panel convened under 20 U.S.C. § 107d-1(b) merits special attention. In *Texas*, the SLA sought funds from the Department of Defense under the income-sharing provisions of the Randolph-Sheppard Act. *Id.* at 402. A duly convened *ad hoc* arbitration panel under § 107d-1(b) awarded approximately ten million dollars to the SLA. *Id.* at 406. In the nearly thirty-page decision, containing a plurality opinion, one concurring opinion and two dissenting opinions, the ten Judges of the Federal Circuit painstakingly analyzed the Legislative History of the Randolph-Sheppard Act. While the award of the arbitration panel was set aside on other grounds, not once in that decision did any of the ten Judges of the Federal Circuit suggest that the arbitration panel was without authority to make the remedial award it did make.

While not of the same significance as conflicting decisions of the Courts of Appeal, Stern, Gressman, *et al.*, notes that Federal District Court decisions are relevant in the Certiorari context primarily as indicators of lower court confusion over an otherwise important question, or a question that gains importance from the very existence of such confusion. *Id.* at 180. In *State of New York v.*

United States Postal Service, 690 F. Supp. 1346 (S.D.N.Y. 1988), the Court adopted the reasoning of the D.C. Circuit in *Weinberger, supra.* In much the same way as had been done in *Weinberger,* the Court in *New York* stayed the effort of the SLA to obtain injunctive relief against a federal agency pending the exhaustion of administrative remedies before a Randolph-Sheppard arbitration panel. The Court there stated "[b]y enacting the arbitration provisions found in Secs. 107d-1(a) and (b), Congress clearly intended to establish a . . . scheme whereby disputes over the *substantive rights* contained in the Act could be resolved." [Emphasis supplied]. *Id.* at 1353.

II. THE DECISIONS OF BOTH THE DISTRICT COURT AND THE COURT OF APPEALS BELOW REVEAL A PROFOUND CONFUSION CONCERNING THE PURPOSE AND INTENDED APPLICATION OF § 107d-1 AND § 107d-2

One of the purposes of Certiorari Jurisdiction is to address lower court confusion "over an otherwise important question, or a question that gains importance from the very existence of such confusion." Stern, Gressman, *et al.*, *supra,* at 180.

Both § 107d-1 and § 107d-2, through and by final binding arbitration, provide the exclusive method of resolving all disputes arising under the Randolph-Sheppard Act either between a blind vendor and a state licensing agency (SLA) or between an SLA and a federal property manager, for the benefit of blind vendors.

20 U.S.C. § 107d-1 and § 107d-2 address two different types of disputes and contemplate two separate and distinct arbitrational mechanisms to resolve those disputes. 20 U.S.C. § 107d-1(a) is concerned with disputes arising under the Act between blind vendors and SLAs. 20 U.S.C. § 107d-1(b) is concerned with disputes arising under the Act btween SLAs and federal property managers, for the benefit of blind vendors. While both arbitration models are ultimately concerned with the rights of the blind, the parties under a § 107d-1(a) and a § 107d-

1(b) arbitration are different, and those sections are concerned with different types of disputes.

However, the District Court and the Court of Appeals below do not acknowledge that difference, and in fact perpetuate a confusion regarding that difference which has its primary genesis in the *Nash* decision. The issue in the case at bar relates to the remedial powers of an arbitration panel to resolve one type of dispute, *i.e.*, a dispute between an SLA and a federal property manager under 20 U.S.C. § 107d-1(b), for the benefit of blind vendors. The issue in *Nash* relates to the remedial powers of an arbitration panel to resolve the other type of dispute, *i.e.*, a dispute between a blind vendor and an SLA under 20 U.S.C. § 107d-1(a).

In the case at bar, involving a dispute between an SLA and a federal property manager, the District Court below, in reliance on *Nash*, refused to enforce the award of an arbitration panel convened pursuant to the Act in favor of the SLA in the State of Maryland against the Department of Veterans Affairs. *Maryland State Department of Education v. United States Department of Veterans Affairs*, 896 F.Supp. 513, 518 (D. Md. 1995). Based on *Nash*, the District Court further concluded that an arbitration panel convened pursuant to 20 U.S.C. § 107d-1(b) "has no remedial powers whatsoever." *Id.* at 517.

The Court of Appeals below affirmed the District Court and held that an award of an arbitration panel convened under the Act to resolve a dispute between an SLA and a federal property manager could not be enforced in Federal Court. *Maryland Department of Education v. United States Department of Veterans Affairs*, 98 F.3d 165, 168 (4th Cir. 1995). The Court below acknowledges that the Congress enacted 20 U.S.C. § 107d-1 and § 107d-2 "to provide the means by which aggrieved [blind] vendors and State agencies may obtain a final and satisfactory resolution of disputes (*Id.* at 171)." The Court nevertheless concludes that an arbitration panel convened under § 107d-1 (b) is limited to a determination of whether the federal entity is in compliance with the terms of the Act (*Id.* at

170), but vests the bestowing of a remedy and the power of correcting the violation exclusively with the federal agency which was found in violation of the Act by a duly convened arbitration panel. *Id.* According to the Court of Appeals below:

> [§ 107d-2(b)(2)] specifically grants the arbitration panel in [§ 107d-1] (b) cases [involving a dispute between a state licensing agency and a federal property manager] authority to decide whether the federal entity's acts "are in violation" of the Act. The provision, however, limits the panel's authority to that decision alone: although the panel may determine that a violation is occurring and may identify the discrete acts that are in violation, *the statute does not authorize the arbitration panel to order the federal entity to take any remedial action.* Rather, the statute expressly places the obligation of ending the violation on the federal entity itself. [Emphasis supplied].

Id. at 170.

Although only a § 107d-1(b) dispute was before them, both the District Court and the Court of Appeals below place heavy reliance on the Eleventh Circuit's decision in *Nash*. While it is true that the *Nash* majority discusses at length a § 107d-1(b) arbitration, that discussion has absolutely nothing to do with the dispute which was in fact at issue in *Nash, i.e.*, a dispute between a blind vendor and an SLA under § 107d-1(a). The error in the *Nash* majority's discussion of a § 107d-1(b) arbitration is explained in Judge Clark's scholarly and well-reasoned dissent in *Nash*. According to Judge Clark, the discussion by the *Nash* majority of what *might* happen in a § 107d-1(b) arbitration under the Act between an SLA and a federal property manager is hypothetical speculation which simply has nothing to do with the issue in *Nash*. *Id.* at 1501. That is, any statements by the *Nash* Court relative to the powers of an *ad hoc* arbitration panel in a dispute between an SLA and a federal property manager are *obiter dicta*. Thus, the reliance of the District Court and the Court of

Appeals below on the "holding" in *Nash* is at best confusing and at worst inappropriate.

III. THE DECISION OF THE COURT OF APPEALS BELOW IS ERRONEOUS

The result of the decision of the Court of Appeals below will be an endless series of advisory decisions by toothless arbitration panels. A recalcitrant federal agency can simply refuse to abide by arbitration panel determinations *ad infinitum*, with impunity. The Respondent DVA in the case at bar has already amply demonstrated a proclivity to recalcitrance in *Riley II*, *supra*. Under the decision below, SLAs will be helpless to obtain redress in Federal Court, regardless of how serious the violation of the Act. Congress' intent to create a mechanism for "prompt and satisfactory disposition of blind licensee and state agency complaints (*U.S. Senate Report No. 93-937*, p.20 (J.A. 157))" will be frustrated to the point of futility. Why should an SLA expend its resources in a cyclical, ever-endless effort to compel compliance with the Act, when blind licensees cannot force such an agency to act (*Nash*, 915 F.2d at 1489) and even a conscientious SLA, such as the one in the case at bar, is denied power to enforce compliance with arbitration panel awards? In other words, the decision of the Court of Appeals below may well encourage other SLAs, such as the one in *Nash*, to refuse to protect vigorously the rights of a blind vendor on federal property.

The inability to enforce § 107d-1 arbitration panel decisions carries with it significant implications for the civil rights of blind vendors which go far beyond the mere placement of vending facilities on federal property. The Court of Appeals below admits that a different statutory structure from the one that it perceived "may have been wiser." 98 F.3d at 170. In fact, leaving SLAs and thus their licensees without an effective means of enforcing requirements of the Act not only does offend "the general moral of common sense," *see id.* at 169-170, it is clearly contrary to the express will of Congress, considerably impedes the administration of the Act and rele-

gates the blind citizens of this Country to second class citizenship as they seek to pursue their rightful employment opportunities and related civil rights on federal property. This Court has exercised its Certiorari Jurisdiction in the past when the decisions of lower Courts have created a serious hindrance to the effective administration of an Act of Congress.[8] This Court has also demonstrated a willingness to exercise that Jurisdiction when the decisions of lower Courts imperil the Constitutional rights of a class of citizens.[9]

A. The Decision of the Court Below Creates a Constitutional Problem Where None Existed Before

By holding that the arbitration panel convened under 20 U.S.C. § 107d-1(b) cannot include a remedy in its award, enforceable in Court, but instead must limit itself to identifying the existence of a violation of the Act and leave to the head of the DVA the duty of remedying the violation, the Court of Appeals below creates a problem of significant Constitutional importance. By thus committing the adjudicative function of providing a remedy to one of the parties to the arbitration—the party who lost—the Due Process right to a neutral, disinterested decision maker has effectively been taken away from the SLA and, in particular, the blind citizens who are third-party beneficiaries of the relationship between the SLA and the federal agencies (*see, e.g., Delaware, supra,* 772 F.2d at 1127).

The Due Process clause of the Fifth Amendment applies in this case because the Randolph-Sheppard Act is a Federal Statute that creates a property interest entitled to Due Process protection. *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Perry v. Sindermann,* 408 U.S. 593 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970). Like the wel-

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[8] *Rothensies v. Electric Battery Co.,* 329 U.S. 296 (1946); *United States v. Ruzicka,* 329 U.S. 287 (1946); *New York v. Saper,* 336 U.S. 328 (1949).

[9] *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 646, n.9 (1981); *National Broiler Marketing Assn. v. United States,* 436 U.S. 816, 820 (1978).

fare recipients in *Goldberg v. Kelly*, the blind vendors whose interests are being adjudicated in this case rely on the Randolph-Sheppard Act to provide "the means to obtain essential food, clothing, housing, and medical care." *Goldberg v. Kelly*, 397 U.S. at 264. In cases like this one, involving administrative proceedings as to persons who are entitled to federal and state benefits that are at risk, "an impartial decision maker is essential." *Id.* at 271.

Due Process requires a neutral and detached judge. *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Dr. Bonham's Case*, 8 Co. Rep. 114a, 2 Brown, 255, 77 Eng. Rep. 647 (C.P. 1610) (Coke, J.). The Constitutional command of a disinterested decision maker is no different when Congress delegates adjudicative functions to an arbitration panel. *Concrete Pipe & Product v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993); *see Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). A remedy is a part of an adjudication in a Constitutional sense, and a neutral decision maker is thus essential. Due Process requires a substantial right of redress by some effective, and efficient, remedy. *Gibbes v. Zimmerman*, 290 U.S. 326 (1933); *Crane v. Hahlo*, 258 U.S. 142 (1922); *cf. Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

The suggestion by the Court below (98 F.3d at 171) that the SLA can simply pursue another arbitration if the DVA does not conform itself to the Act (which it very probably will not, as is clear from *Riley II*, *supra*), will not cure the unconstitutional deprivation caused by the absence of a detached and disinterested decision maker in the first instance. *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972).

The head of the DVA is not the kind of ostensibly disinterested decision maker whose bias must be shown to exist before he is disqualified to sit as a decision maker. *See Hortonville J.S.D., No. 1 v. Hortonville Education*

Ass'n, 426 U.S. 482, 491-93 (1976). The head of the DVA is a party to the arbitration in the Court below and he is a party to the arbitration in both *Riley I* and *II*, *supra*. He has already taken a position adverse to the SLA in both cases, and as is clear from *Riley II*, *supra*, he is apparently very intent on disregarding the Randolph-Sheppard Act, instead of enforcing it.

There is another Constitutional problem created by the Court below. The decision of that Court, and the Court in *Nash*, effectively construes away a remedy provided by Congress, and this is most emphatically inconsistent with this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 66-67.

This Court has exercised its Certiorari Jurisdiction when the decision of a Court of Appeals below appears to misapply, disregard, or otherwise misconstrue precedents of this Court. *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982).

Where an otherwise acceptable construction of a statute will raise Constitutional problems, this Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). The decisions of the other Courts of Appeals and District Courts which have addressed the Randolph-Sheppard Act have demonstrated that such a construction of the Act is "fairly possible," and that construction, *i.e.*, the one recognizing the remedial powers of an arbitration panel under § 107d-1, should be adopted by this Court. *International Association of Machinists v. Street*, 367 U.S. 740, 749-750 (1961); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.).

B. The Legislative History of the Act Demonstrates That Congress and the Secretary of Education Intended Arbitration Panels Convened Under 20 U.S.C. § 107d-1 to Have Remedial Powers Enforceable in Court

There is very strong evidence in the Legislative History underlying the Act that the Congress viewed the arbitration mechanism in the 1974 Amendments to be the functional equivalent of an adjudication. In *Senate Report 93-937* (J.A. 157), the Committee on Labor and Public Welfare stated as follows, in a section entitled "Arbitration and Judicial Review:"

> The bill creates two new sections of the Act which establish the machinery for a *grievance resolution procedure*. . . . The Committee considers the arbitration procedures contained in S. 2581 to be valuable tools for the *resolution of disputes.* Under current circumstances, machinery for *prompt and satisfactory disposition* of blind licensee and state agency *complaints* does not exist. . . . The Comptroller General's Report states that HEW and state agencies are still *without recourse* from decisions of federal agencies regarding blind vendor facilities on property they control. Moreover, *blind vendors have attempted to bring their grievances to the judicial system* for resolution. In the case *Wilson v. Blount,* for example, the U.S. District Court . . . held that the plaintiff blind vendor had no standing to challenge the legal basis of the decision of the Postmaster General. . . . *It is the expectation of the Committee that the arbitration and review procedures adopted in S. 2581 will provide the means by which aggrieved vendors and state agencies may obtain a final and satisfactory resolution of disputes.* [Emphasis supplied].

Id. at 20.

Moreover, the decision of the Court below fails to take account of the very close nexus which exists between the Randolph-Sheppard Act and the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* Originally, the 1974

Amendments to the Randolph-Sheppard Act were to be included (as apparently was the entire Randolph-Sheppard Act) as a sub-title of the Rehabilitation Act. What became the 1974 Amendments were in fact part of the proposed Rehabilitation Act of 1972. 119 Cong. Rec. 34,082 (1973). They were dropped from the Rehabilitation Act in 1973 because of a technicality. *Hearings before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2581*, 93rd Cong., 1st Sess. 21 (1974) [in the record below as an appendix to the Brief *Amicus Curiae* of the NFB, filed with the Court of Appeals below on October 21, 1995].

Because the 1974 Amendments to the Randolph-Sheppard Act were originally included as a separate title within the Rehabilitation Act of 1973, and later dropped solely due to a technicality, there can be no reason to believe that those Amendments should not be construed in the same manner in which the Rehabilitation Act of 1973 is construed. Additionally, the Legislative History of the Rehabilitation Act demonstrates that the Rehabilitation Act "in effect strengthens the Randolph-Sheppard Act and gives added protection to the blind." 120 Cong. Rec. 35,712 (1974). The Rehabilitation Act and the 1974 Amendments to the Randolph-Sheppard Act only tend to reinforce this interpretation. S. 2581, 93rd Cong., 1st Sess. 39 (1974) [in the record below as an appendix to the Brief *Amicus Curiae* of the NFB, filed with the Court of Appeals below on October 21, 1995].

The Americans with Disabilities Act of 1990 is to be judicially interpreted in the same manner as the Rehabilitation Act, because of their similar language and purpose. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 833, n. 3 (9th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 711 (1996). It is well recognized that both the ADA and the Rehabilitation Act were enacted by Congress pursuant to the Fourteenth Amendment to the United States Constitution, and thus do not fall within the proscription barring damage actions against the several

states under the Eleventh Amendment, established by this Court in *Seminole Tribe of Florida v. Florida*, —— U.S. ——, 116 S.Ct. 1114, 1125 (1996). The ADA specifically provides that its purpose is "to invoke the sweep of Congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities." 42 U.S.C. § 12101(b)(4); *see also, Mayer v. University of Minnesota*, 940 F. Supp. 1474, 1480 (D. Minn. 1996). Similarly, this Court has recognized that the Rehabilitation Act was enacted by Congress under the Fourteenth Amendment. *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 472, n.2 (1987).

Although the Randolph-Sheppard Act is silent concerning the Constitutional basis upon which Congress enacted that Act, it can safely be concluded from the Legislative History of that Act (when coupled with the close nexus between it and the Rehabilitation Act of 1973 and the ADA) that the Randolph-Sheppard Act was similarly enacted pursuant to the Fourteenth Amendment. Thus, a Randolph-Sheppard Act arbitration panel convened pursuant to 20 U.S.C. § 107d-1(a) may properly award damages against a State, despite the Eleventh Amendment. *See, e.g., Delaware Department of Health and Social Services v. United States Department of Education, supra*, and *McNabb v. United States Department of Education, supra.* Since the Fourteenth Amendment is simply a vehicle by which to apply certain provisions of the Bill of Rights to the several States, *a fortiori* an arbitration panel convened pursuant to 20 U.S.C. § 107d-1(b) is also authorized to award damages or provide for other relief against federal agencies.

C. The Close Affinity Between the Randolph-Sheppard Act and Labor Law Reinforces the Conclusion That Arbitration Panels Under the Act Were Intended To Have a Full Range of Remedial Responses Available to Them Which Are Enforceable in Court

As noted *supra*, the Third Circuit Court of Appeals in *Delaware Department of Social Services* recognized the close affinity between the Randolph-Sheppard Act and Labor Law.

> The contractual relationship is both analogous to and different from the relationship resulting from a collective bargaining agreement or a single person employment contract. It is analogous because the participating state, like a typical employer, maintains a large degree of control over the activities of the vendor. . . . Nevertheless the relationship between the blind vendor and the state, like conventional employment relationships, is essentially contractual. The terms of the contract are standardized by virtue of the agreement between the participating states and the United States. Thus, since 1974 each blind vendor enjoys the benefit of the arbi -ation undertaking specified in 20 U.S.C. Sec. 107b(6).

772 F.2d at 1136.

As noted by the Court below, the Act is a labor and employment statute, enacted "to provid[e] blind persons opportunities, and assist them in becoming more self-supporting." 98 F.3d at 166. In fact, the structure of the Act, and particularly the Secretary of Education's regulations, share a number of characteristics in common with federal labor law.[10] It therefore is not surprising that when

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[10] To insure employment opportunities for blind licensees, the Act and its regulations authorize state licensing agencies to secure space on federal property for blind vendor stands. *See, e.g.*, 34 C.F.R. §§ 395.30, 395.31. The Act and regulations authorize state licensing agencies to set aside funds from vending facility proceeds for "[t]he establishment . . . of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time . . . ." 34 C.F.R. § 395.9(5). State licensing agencies must provide vocational and other training services to

Congress decided in 1974 that the Act required new tools of enforcement, it turned to the arbitration mechanism that had proved so successful in resolving disputes in conventional labor-management relationships.

Space does not permit a lengthy discussion of federal labor arbitration law, nor is it necessary. This Court knows well that in any form of "arbitration" known to Congress in 1974, arbitration panels had authority to order remedies for violations of the governing standard (for example, collective bargaining agreements). The Court below, however, assumes implicitly that the Act uses the word "arbitrate" to mean something different from what it ever has meant before. Ample case law demonstrates that a court should not indulge in such an assumption unless compelled to do so. *See, e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. at 73 ("we presume Congress enacted this statute with the prevailing traditional rule in mind"). According to *Delaware Dept. of Health and Social Services v. United States Department of Education*, 772 F.2d at 1130: "Except for the unique judicial review provision, there is no indication . . . that Congress used the term arbitration in any manner different from its conventional usage in other contexts. . . . [N]o member of Congress ever suggested that the scope of relief which could be awarded . . . was in any degree different from that available in other arbitration proceedings."

The prevailing understanding of arbitration (at least in the labor context) in 1974 was largely defined by the U.S. Supreme Court's "Steelworkers trilogy" cases. Among other things, those cases view arbitration as a "means of solving the unforeseeable by molding a system of private law." *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). It emphasized that

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blind vendors, including on-the-job training in all aspects of vending facility operation. 34 C.F.R. § 395.11. In effect, a blind vendor operates a small business in partnership with a state licensing agency. *See generally*, 20 U.S.C. § 107b; *cf.* 34 C.F.R. §§ 395.4, 395.6, and 395.7.

courts should refuse "to review the merits of an arbitration award," because "[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596 (1960). *See also Devine v. White*, 697 F.2d 421, 453-36 (D.C. Cir. 1983) ("the arbitration result must be final and binding. Disputes should be conclusively resolved privately. Protracted litigation acts as an irritant in the industrial relationship").

Federal courts may not *review* labor arbitrators' findings or legal conclusions, but they have an important role in the *enforcement* of arbitration awards. *See, e.g., Armco Employees Independent Federation v. Armco Steel Co.*, 65 F.3d 492, 495-96 (6th Cir. 1995).

The common law in 1974 was in agreement. *La Vale Plaza v. Noonan*, 378 F.2d 569, 572 (3rd Cir. 1967).

CONCLUSION

The practical result of the decision of the Court of Appeals below, and that of the *Nash* Court, is that the civil rights of the blind citizens residing in Maryland, West Virginia, Virginia, North Carolina, South Carolina, Alabama, Georgia, and Florida are qualitatively and substantively different from and less than those of their fellow blind citizens throughout the rest of the United States. This is not right in any sense of the word, and this Court should issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the case at bar to address this most serious Constitutional Law and Federal Law split among the Federal Circuits.

This is not a class action. However, the NFB stands before this Court on behalf of the blind citizens of this Nation as surely as if it were. As Chief Justice Vinson said nearly fifty years ago: "Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions, that you represent not only your clients,

but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country." [11] Nothing less than the plans, hopes and aspirations of the blind citizens of this Nation are now before this Court.

Respectfully submitted on behalf of the National Federation of the Blind and Donald J. Morris this 28th day of March, 1997.

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[11] Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, as quoted in Stern, Gressman, *et al.*, at 163-64.